Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
AT&T Corp. Petition for Declaratory Ruling	)	
Regarding Enhanced Prepaid Calling	)	WC Docket No. 03-133
Card Services	)	

OPPOSITION TO AT&T'S MOTION FOR STAY PENDING APPEAL, SUBJECT TO POSTING OF SECURITY

BellSouth Corporation, on behalf of itself and all wholly owned affiliates ("BellSouth"), by its attorneys, files this Opposition to AT&T's Motion for Stay Pending Appeal, Subject to Posting of Security seeking to stay the Commission's recently decided *Prepaid Card Order*[1] in this proceeding. The Commission must deny AT&T's Motion because it does not meet the requirements necessary to obtain the relief of a stay. First, AT&T has presented nothing new from the arguments it presented throughout this proceeding and has no likelihood of prevailing on the merits. Second, AT&T will not be irreparably harmed if the stay is not granted. Finally, the public interest will be harmed if the stay is granted.

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1 *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services; Regulation of Prepaid Calling Card Services*, WC Docket Nos. 03-133 & 05-68, *Order and Notice of Proposed Rulemaking*, WC Docket 03-133, FCC 05-41 (rel. Feb. 23, 2005) ("*Prepaid Card Order*").

I. Introduction and Background

In 2003, AT&T filed a Petition seeking declaratory judgment regarding the proper service and jurisdictional classification of its prepaid calling card services.[2] The cards are typical prepaid calling cards that require the purchaser/caller to call a toll-free number, which connects the caller to a calling card platform. Once on the platform, the caller is given a menu of options on how to complete the call. Additionally, the platform will deliver an advertisement to the caller from the retailer from whom the card was purchased. After hearing the advertisement, the caller then completes the call. AT&T asserted in its Petition and various *ex parte* communications that the advertisement transformed the entire prepaid card call to an enhanced or information service under the Commission's rules and the Telecommunications Act of 1996 ("1996 Act").[3]

Based on these facts, AT&T contended that when the caller completes a call using the "enhanced" calling card platform, the call is actually *two* calls, rather than one. AT&T thus concluded that the jurisdiction of the two calls must be established separately. The jurisdiction of the first call – the caller to the platform – is based on where the caller is located, as the beginning point, and where the platform is located as the end point. The jurisdiction of the second call – the platform to the called party – is based on where the platform is located, as the beginning point, and where the called party is located as the end point. Based on these conclusions, AT&T claimed that all calls made that used the prepaid card platform were therefore enhanced services that were purely interstate in nature and, therefore, failed to pay Universal Service Fund ("USF") assessments and intrastate access charges on all such calls.

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[2] AT&T Corp. Petition for Declaratory Ruling, WC Docket No. 03-133, (filed May 15, 2003) ("*Petition*").

[3] *Id.* at 9.

The Commission considered AT&T's claims and properly denied its request, finding that the calls made over the prepaid card platform were telecommunications, not enhanced or information, services and that the jurisdiction of the calls is determined by the originating and terminating points of the caller and called party. The Commission ordered AT&T to make appropriate payments to the USF. Moreover, the Commission's order made clear that intrastate access charges should have been paid for all intrastate calls made using the platform. AT&T has estimated that it owes approximately $553 million dollars in USF assessments and intrastate access fees. AT&T appealed the Commission's order to the Circuit Court of Appeals for the District of Columbia. It now asks the Commission to stay its order until the appeal is concluded.

II. AT&T Does Not Meet the Standard for Receiving a Stay

In order to receive a stay of the *Prepaid Card Order* pending appeal to the D.C. Circuit, AT&T must demonstrate "(1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay."[4] AT&T cannot demonstrate any of these elements, much less all of them.

A. It is Unlikely That AT&T Will Prevail on the Merits

First, AT&T is not likely to prevail in its appeal to the D.C. Circuit. Indeed, AT&T offers nothing new in its Motion but merely repeats the same arguments it made to the Commission throughout the proceeding. To begin, AT&T disagrees with the Commission's decision that AT&T's prepaid card service is not an enhanced or information service. The very basis of AT&T's petition was that its service did meet the definition of an enhanced or

4 *See Telephone Number Portability; United State Telecom Association and CenutryTel of Colorado, Inc. Joint Petition for Stay Pending Judicial Review*, CC Docket No. 95-116, *Order*, 18 FCC Rcd 24662, 24665 ¶ 4 (2003) ("*LNP Stay Request Order*").

information service and AT&T argued this point continually throughout the entire process. In its Motion, AT&T seems to be incapable of accepting the fact that independent review of the service by the Commission found it to be a telecommunications service.

In its Motion for Stay, AT&T begins with the presupposition that its service *is* an enhanced service and therefore must be an information service pursuant to the Commission's conclusion in the *Non-Accounting Safeguards Order.*[5] From this staring point AT&T then walks through the same arguments and cites the same authority to support its claims. The Commission had the benefit of these arguments made by AT&T as well as the counter arguments made by opposing entities in reaching its decision. The Commission weighed these arguments and reached the only reasoned decision allowable under the existing law. AT&T's mere disagreement with this decision is not a basis for overturning it on appeal.[6]

AT&T also contends that even if it does not prevail on its recycled arguments, it is likely to succeed on appeal because the Commission reversed past precedent and applied its decision retroactively. The fallacy of this argument, of course, is that the Commission did not reverse but instead applied long established precedent. Indeed, had the Commission accepted AT&T's

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5 *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Docket No. 96-149, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905, (1996) ("*Non-Accounting Safeguards Order*").

6 *See LNP Stay Request Order,* 18 FCC Rcd at 24665, ¶ 5 (2003) ("The showings made by the Joint Petitioners are repetitive of matters specifically considered and rejected by the Commission in that underlying Order, and thus do not satisfy the first factor [requirement to demonstrate a likelihood of irreparable harm] set forth above."); *Illinois Citizens Utility Board Motion for Stay of 47 CFR § 52.19(c)(3)(ii)*, CC Docket No. 96-98, *Order*, 17 FCC Rcd 215, 217, ¶ 8 (2001) (First, the CUB has not set forth new or novel arguments in support of its request for stay that are different from those already presented to, considered by, and rejected by the Commission. It has therefore failed to demonstrate a likelihood of success on the merits of its related waiver petition, given that it has not provided any explanation or justification as to why we should now reverse our earlier determinations.").

contrived position, it would have reversed years of opinions that squarely found a telephone call from an origination point in a state to a termination point within the same state to be an intrastate telecommunications service. Because the Commission did not reverse prior precedent, it did not apply any new rules on a retroactive basis.

Clearly, AT&T is not likely to prevail on the merits of its appeal. Even if such likelihood existed, however, AT&T's request for a stay must fail because none of the other elements are met.

B. AT&T Will Not Suffer Irreparable Harm If a Stay Is Not Granted

AT&T's claim of irreparable harm is completely without merit. AT&T claims that it will suffer irreparable harm if a stay is not granted because the Commission has required AT&T to make the improperly withheld USF contributions on its prepaid card services and if it is successful in having the Commission's decision overturned on appeal AT&T may not get back all of the money it will pay into the fund. This frivolous claim is an irresponsible attempt by AT&T to create the illusion of a potential harm that does not exist. The Commission cannot be hoodwinked by these claims.

The standard that AT&T must meet is to demonstrate that it *will* incur irreparable harm if the stay is not granted, not speculation on what may occur under a contrived set of circumstances. AT&T, however, does not even argue that irreparable harm will occur but instead acknowledges that there is merely "a substantial risk that AT&T would not recover" its payment to the USF in full if its appeal is successful. In accessing the merits of a stay, past authorities have recognized that "bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur."[7]

AT&T's alleged harm has absolutely no merit in this situation because should the court overturn the Commission's decision – which it will not – the Commission has the authority, or the court has the authority to direct the Commission to exercise its authority, to ensure a full refund of any money AT&T pays into the USF. As the D.C. Circuit has found, "[t]he mere possibility that after [the] litigation is concluded, and assuming [AT&T prevails], the court might not decree refund, and the Commission might then also refuse to provide it because of reliance on its overturned decision, is in no way enough to satisfy our clear and oft-repeated standard."[8] Accordingly, AT&T has not demonstrated it will incur irreparable harm if the stay is not granted.

C. A Stay Will Cause Harm to Others

AT&T passes over the third element as if it has no significance and attempts to meet the element by merely pointing to its offer of a letter of credit to ensure the payment of its required contributions to the USF. AT&T fails to acknowledge the carriers that have lost millions of dollars by AT&T illegally withholding intrastate access charges, however, and offers no basis to ensure they will be paid or will recover the interest on past withholdings. Moreover, simply pledging a letter of credit to act as collateral to ensure that the USF fees will be paid once AT&T's appeal is denied will not protect the interest of carriers that have properly paid contributions to the USF. The structure of the USF assessments is based on first establishing the amount that must be contributed to the fund. Once this amount is established, assessments are spread among the industry. If one carrier does not pay its fair share to the fund, that carriers

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7 *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

8 *Id.*

obligations must be picked up by the remaining carriers. AT&T's illegal withholding of its USF payments has not only caused an increased burden on carriers that have followed the Commission's rules but continues to increase their burdens until AT&T's lawfully required contributions are actually paid into the fund.

D. The Public Interest Will Be Harmed If a Stay Is Granted

There is no question that the public interest does not favor the granting of a stay. The USF is an important part of ensuring that the national phone network continues to provide affordable communications for all. As previously discussed, AT&T's evasion of its obligation to make payments to the USF places a disproportionate burden for the fund on other carriers. Unfortunately, AT&T has been successful in prolonging the time in making payments it owes to the USF for over a year while the Commission debated AT&T's petition. This period of non-payment increased the burden on the remaining carriers that were lawfully contributing to the USF and threatened the public interest by causing an unfair burden on those carriers. Allowing further delay will continue to harm the public interest.

Moreover, AT&T's recalcitrant attitude toward fulfilling its legal obligations threatens the integrity of the fund. If the Commission grants AT&T a stay, it will only be rewarding AT&T's behavior of stalling the payment of its lawful obligations and will send an unwelcome message to the rest of the industry that it is acceptable to simply cook up a scheme that allows carriers to avoid USF contributions for an extended period of time.

For the reasons stated herein, the Commission must deny AT&T's request for a stay pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 4th day of April 2005 served the following parties to this action with a copy of the foregoing **OPPOSITION** by electronic filing and/or by placing a true and correct copy of same in the United States Mail, postage prepaid, addressed to the parties on the attached service list.

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